Supreme Court, U.S.
FILED
SEP 29 2015
OFFICE OF THE CLERK

No. 14-1146

In the

Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

v.

PEG BOUAPHAKEO, ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Writ of Certiorari to the U.S. Court of Appeals for the Eighth Circuit

BRIEF FOR *AMICI CURIAE* URETHANES PLAINTIFFS IN SUPPORT OF RESPONDENTS

DONALD L. PERELMAN
ROBERTA D. LIEBENBERG
GERARD A. DEVER
MATTHEW DUNCAN
PAUL COSTA
FINE, KAPLAN AND BLACK, RPC
One South Broad Street
23rd Floor
Philadelphia, PA 19107

PAUL D. CLEMENT
Counsel of Record
JEFFREY M. HARRIS
BANCROFT PLLC
500 New Jersey Avenue, NW
Seventh Floor
Washington, DC 20001
(202) 234-0090
pclement@bancroftpllc.com

Counsel for Amici Curiae
Additional Counsel on Inside Cover

September 29, 2015

RICHARD A. KOFFMAN
KIT A. PIERSON
CHRISTOPHER J. CORMIER
SHARON K. ROBERTSON
LAURA M. ALEXANDER
COHEN MILSTEIN
SELLERS & TOLL,
PLLC
1100 New York Ave. NW
Suite 500, West Tower
Washington DC 20005

ROBERT W. COYKENDALL
ROGER N. WALTER
MORRIS, LAING,
EVANS, BROCK &
KENNEDY, CHARTERED
300 North Mead
Suite 200
Wichita, KS 67202

JOSEPH GOLDBERG
FREEDMAN BOYD
HOLLANDER
GOLDBERG URIAS
& WARD, P.A.
20 First Plaza
Suite 700
Albuquerque, NM 87102

TABLE OF CONTENTS

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. The *Urethanes* Case Involved A Textbook Use Of Rule 23 To Address "The Supreme Evil Of Antitrust Law"—A Horizontal Price-Fixing Conspiracy 4

II. Dow's Challenges To The *Urethanes* Jury Verdict Are Wholly Without Merit 7

III. The Court's Resolution Of The Instant Case Should Not Affect The Use Of Class Actions Or Well-Established Statistical Tools In Price-Fixing Cases 12

CONCLUSION 14

TABLE OF AUTHORITIES

Cases

Amchem Prods., Inc. v. Windsor,
521 U.S. 591 (1997) 13

Cooper Indus. v. Leatherman Tool Grp.,
532 U.S. 424 (2001) 12

In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651 (7th Cir. 2002) 9

Manpower, Inc. v. Ins. Co. of Penn.,
732 F.3d 796 (7th Cir. 2013) 12

In re Pharm. Indus. Average Wholesale Price Litig., 582 F.3d 156 (1st Cir. 2009) 12

In re Publ'n Paper Antitrust Litig.,
690 F.3d 51 (2d Cir. 2012) 8

In re Urethane Antitrust Litig.,
2013 WL 2097346
(D. Kan. May 15, 2013) 7, 8, 9, 14

In re Urethane Antitrust Litig.,
251 F.R.D. 629 (D. Kan. 2008) 5, 6

In re Urethane Antitrust Litig.,
768 F.3d 1245 (10th Cir. 2014) ..... *passim*

Verizon Commc'ns v. Law Offices of Curtis V. Trinko,
540 U.S. 398 (2004) 2, 13, 15

Wal-Mart Stores v. Dukes,
131 S. Ct. 2541 (2011) 7

Other Authority

Rubinfeld, *Reference Guide on Multiple Regression*, in Federal Judicial Center, Reference Manual on Scientific Evidence (3d ed. 2012) 14

INTEREST OF *AMICI CURIAE*[1]

Amici curiae Industrial Polymers, Inc., Quabaug Corporation, and Seegott Holdings, Inc., are businesses that, *inter alia*, purchase urethane products that a jury found were the subject of a massive price-fixing cartel. *Amici* are the named plaintiffs in *In re Urethane Antitrust Litigation*, 768 F.3d 1245 (10th Cir. 2014), *petition for cert. pending*, No. 14-1091 (filed Mar. 9, 2015). That case involved a years-long, executive-level conspiracy in which several horizontal competitors conspired to fix prices on billions of dollars of commerce in commodity urethane chemicals. The *Urethanes* case involved a textbook use of Rule 23: the plaintiffs offered extensive common evidence showing that the defendants conspired to fix prices, that their malfeasance had class-wide impact, and that the plaintiffs were entitled to damages.

This Court's decision in the instant case should have no effect whatsoever on the use of Rule 23 in the *Urethanes* case, which involves legal claims, record evidence, and expert testimony that are entirely different from the Fair Labor Standards Act (FLSA) wage-and-hour claims currently before the Court.

---

[1] This brief was not written in whole or in part by counsel for any party, and no person or entity other than *amici* and their counsel has made a monetary contribution to the preparation and submission of this brief. Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC, represents the Respondents in this case and the Respondents in *Dow Chemical Co. v. Industrial Polymers*, No. 14-1091 (who are *amici* here). The Kellogg Huber attorneys representing the Respondents in this case had no involvement in the preparation of this brief. The parties have consented to the filing of this brief.

Thus, but for the decision of Dow Chemical Company, the defendant in *Urethanes*, to file an *amicus* brief presenting a highly skewed version of the facts in the *Urethanes* case, *amici* would have no interest in the *Tyson* case. *Amici* submit this brief for the limited purpose of responding to Dow's filing. As explained below, the *Urethanes* case involved a textbook use of Rule 23 that can and should be upheld regardless of how the Court resolves the discrete and different issues in the instant case.

SUMMARY OF ARGUMENT

This Court has described executive-level price-fixing conspiracies as "the supreme evil of antitrust." *Verizon Commc'ns v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 408 (2004). The *Urethanes* case involved a years-long conspiracy to fix the prices of billions of dollars of commerce in urethane chemicals, featuring everything from secret off-shore meetings to clandestine calls from gas station pay phones.

After a four-week trial and a vast evidentiary showing—including extensive common evidence of the conspiracy and its class-wide impact—the jury found that Dow and its competitors engaged in an unlawful cartel that resulted in a class of corporate purchasers paying higher prices for urethane chemicals than they would have paid but-for the conspiracy. The actual trial confirmed that common issues and common evidence overwhelmingly predominated over any individual issues, and that the class action was eminently manageable.

Every federal judge involved in the *Urethanes* case has rejected Dow's efforts to upset the jury verdict and damage award. With the benefit of the exhaustive

trial record and its experience overseeing eight years of hard-fought litigation, the District Court rejected Dow's untimely attempt to decertify the class and its post-trial challenges to the verdict and damage award. The Tenth Circuit unanimously affirmed, holding that whether the conspiracy impacted urethane prices was "a common question that was capable of class-wide proof." *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1255 (10th Cir. 2014). Dow subsequently sought panel and *en banc* rehearing, but not a single judge voted to grant the petition.

In its *amicus* brief here, Dow regurgitates the same arguments it raises in its pending certiorari petition, but those contentions fare no better here (and are misplaced in this plainly distinguishable context). For example, Dow contends that class certification in *Urethanes* was based on "presumptions" and "shortcuts," and that individualized issues predominated over class-wide issues. To the contrary, the District Court and Tenth Circuit allowed the *Urethanes* case to proceed as a class action based on a rigorous analysis of the extensive *evidence* of Dow's misdeeds and their systematic impact on the class, including evidence of class-wide impact from Dow's *own* witnesses and documents. Dow also attacks the damage award as an impermissible "trial by formula," but simply attaching a label to a routine use of time-tested statistical techniques is not enough to create a *Wal-Mart* issue. The plaintiffs' expert analysis was grounded in well-established statistical techniques that have been routinely (and unobjectionably) used in antitrust cases for years by both plaintiffs and defendants.

At bottom, Dow's unusual *amicus* brief is a thinly-veiled attempt to lay the foundation for a remand if the Petitioner prevails in the instant case. But the FLSA wage-and-hour claims currently before the Court are vastly different in terms of both law and fact from the horizontal price-fixing claims at issue in *Urethanes*. Moreover, Dow made a number of strategic gambits in the *Urethanes* case that it should not be permitted to recant now that it has taken its case to the jury and lost. The *Urethanes* verdict should be upheld in all respects regardless of how this Court decides the instant case.

ARGUMENT

I. The *Urethanes* Case Involved A Textbook Use Of Rule 23 To Address "The Supreme Evil Of Antitrust Law"—A Horizontal Price-Fixing Conspiracy.

In the *Urethanes* case, Dow and four of its ostensible competitors engaged in a years-long, executive-level conspiracy to control the prices of billions of dollars of commerce in commodity "urethane" chemicals. The evidence of collusion—and industry-wide impact—was overwhelming. One Dow executive flatly stated that "there was an agreement" to fix prices. SA1274.[2] And a mountain of documentary, testimonial, and expert evidence established that the cartel worked exactly as intended, inflating urethane chemical prices across the board.

Dow played a central role in the conspiracy. For example, one Dow executive participated in "8 to 15"

---

[2] The SA and AA citations in this brief refer to the Appendix filed in the Tenth Circuit in the *Urethanes* case.

price-fixing discussions with his urethanes counterpart at Bayer, including episodes in which the Bayer executive left his office to return a call from a gas station pay phone and had his office swept for "bugs" to avoid detection. SA881-82, 905-08, 921, 997. The cartel held secret price-fixing discussions in airports, hotels, golf resorts, coffee shops, in side meetings at trade association events, in walks outside to avoid "listening devices," on home and cellular phones, and at a restaurant in Belgium (for which the expense report was falsified to conceal the identity of the participants). SA15, 29-30, 867-893, 1995-98. Needless to say, all of this evidence was not only devastating, but the very paradigm of common evidence on a common issue that would recur in every purchaser's antitrust action against Dow and its co-conspirators.

The *Urethanes* plaintiffs brought suit more than a decade ago on behalf of a class of purchasers, alleging that Dow and its co-conspirators engaged in an illegal price-fixing cartel between January 1999 and December 2004. Like the vast majority of price-fixing cartels in commoditized markets, this cartel was ideally suited for class treatment under Rule 23. After nearly four years of pre-certification discovery, the District Court "carefully and thoroughly reviewed the class certification record" and granted the plaintiffs' motion for certification. *In re Urethane Antitrust Litig.*, 251 F.R.D. 629, 637 (D. Kan. 2008). The court "perform[ed] a rigorous analysis" and required the plaintiffs to satisfy a "strict burden of proof" to establish that the requirements of Rule 23 had been met. *Id.* at 631. Considering the class certification record as a whole, the court found that common issues

regarding both the existence of a conspiracy and price impact predominated over individualized issues.

A four-week trial followed that featured common evidence introduced by not only the plaintiffs but also Dow. After carefully weighing all of this evidence, and receiving proper instructions about the governing law, the jury returned a class-wide verdict in favor of the plaintiffs. The jury found that: (1) Dow participated in a conspiracy to fix, raise, or stabilize prices for urethane chemicals; (2) the conspiracy caused the plaintiffs to pay more for urethane chemicals than they would have paid absent the conspiracy; and (3) class-wide damages totaled $400,049,039.

The Tenth Circuit unanimously affirmed, holding that the District Court did not abuse its discretion by certifying the class and upholding the damage award. *See Urethane*, 768 F.3d at 1253-59. The court concluded that whether the conspiracy impacted prices was "a common question that was capable of class-wide proof." *Id.* at 1254-55. Indeed, the Tenth Circuit noted that "Dow has not identified a single class member for whom injury was impossible." *Id.* at 1267. And the jury could have inferred from the evidence "that a conspiracy existed and ... caused prices to be higher than they would have been in a marketplace free of collusion." *Id.* at 1255, 1266 & nn.21-22.

The Tenth Circuit also rejected Dow's attempt to analogize this case to the impermissible "trial by formula" in *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541 (2011). In *Wal-Mart*, individualized proceedings were necessary because the common questions—the reasons for the pay and promotion disparities—could

not yield a common answer "in one stroke." *Id.* at 2551-52. In *Urethanes*, by contrast, "there were two common questions that could yield common answers at trial: the existence of a conspiracy and the existence of impact." 768 F.3d at 1256. Finally, the Tenth Circuit also rejected Dow's criticisms of the damages award, holding that the plaintiffs' use of the well-established statistical technique of extrapolation—which was based on a multiple regression analysis of more than one million *actual* urethanes transactions—reliably estimated damages for transactions that could not be modeled directly. *See id.* at 1256-57; *see also In re Urethane Antitrust Litig.*, 2013 WL 2097346, *3 (D. Kan. May 15, 2013).

Dow subsequently filed a petition for panel rehearing or rehearing *en banc*, which the Tenth Circuit denied on November 7, 2014. Not a single judge voted to grant rehearing.

II. Dow's Challenges To The *Urethanes* Jury Verdict Are Wholly Without Merit.

Dow attempts to use its *amicus* brief in this case to obtain a second bite at the apple in challenging the jury's verdict in the *Urethanes* case. Those arguments fare no better here than they do in the appropriate forum in which to raise such issues (Dow's pending certiorari petition).

A. Dow does not dispute that it engaged in a years-long horizontal price-fixing conspiracy. It could not, as the jury's finding of a conspiracy based on overwhelming and overwhelmingly common evidence is unimpeachable. Instead, Dow contends (at 2-3, 10-11) that the *Urethanes* case never should have been certified for class treatment because "many

purchasers were not injured at all" and the lower courts used "illegitimate shortcuts and approximations that papered over enormous variations among class members." As every judge to review the record in the *Urethanes* case has concluded, those arguments fail.

The *Urethanes* judgment did not turn on any "shortcuts" or "presumptions," but on extensive *evidence* showing that the unlawful conspiracy had a class-wide impact on prices. That evidence was overwhelming. The plaintiffs presented common proof showing that cartel members issued a series of industry-wide lockstep price increase announcements coordinated by top executives with nationwide pricing authority. *See Urethane*, 768 F.3d at 1254-56, 1266 & nn.21-22; *Urethane*, 2013 WL 2097346, at *3, 6; *see also In re Publ'n Paper Antitrust Litig.*, 690 F.3d 51, 67-68 (2d Cir. 2012) (class-wide impact supported by coordinated lockstep price increases).

Indeed, even Dow's own documents and witnesses recognized that the collusive price increases were successful. One Dow witness admitted that the collusive announcements served as the starting point for *all* customer negotiations and that, post-negotiation, customers routinely accepted the full price increases and partially accepted many others. SA1273-74, 3886, 4156; *see In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 656 (7th Cir. 2002) (the higher the list price, "the higher the ultimately bargained price is likely to be"). Internal documents from the conspirators also described the price-increase announcements as "successful," SA303, and "solid," AA1639. Cartel members boasted that

they "got the full increases" and that "the price increases [are] becoming effective and being paid." SA300, 342. Another Dow document gleefully announced that the price increases were "**Working!!!!!!!.**" 768 F.3d at 1266 n.22 (emphasis and exclamation points in the original).

Expert testimony also provided common evidence of class-wide impact. One plaintiffs' expert (whose testimony Dow did not challenge on appeal) testified that the structural features of the urethane industry—a concentrated market of homogenous products with high barriers to entry and no close product substitutes—made the industry highly conducive to class-wide price effects, and that nearly all class members had been impacted. *Id.* at 1258-59, 1265; *Urethane*, 2013 WL 2097346, at *7. And another expert offered a multiple-regression analysis of more than one million *actual* urethane transactions—comparing actual post-negotiation prices to prices that would have prevailed in a competitive market—that showed systematic overcharges throughout the conspiracy period, across all urethane products, all geographic regions, and for large and small customers alike. 768 F.3d at 1256, 1260-63. Even Dow's expert economist conceded that actual price increases routinely followed the lockstep announcements. SA5258.

For the same reasons, Dow is flatly wrong to suggest (at 10) that the prices customers paid "were often unaffected by the price announcements." As the Tenth Circuit correctly recognized, Dow has failed to identify any *actual* class members that were not impacted in some way by the cartel. *See* 768 F.3d at

1267. The record showed that the cartel's coordinated pricing either affirmatively increased prices or, at a minimum, *maintained* prices that otherwise would have fallen in a competitive market. The existence of some negotiations by individual purchasers (which would have proceeded from a different baseline) hardly disproves class-wide impact in a case where prices would have fallen sharply absent the cartel's illegal actions. *Id.* at 1254 n.6.

It is also revisionist history for Dow to assert (at 10-11) that "the constraints of class discovery and trial" prevented it from offering individualized evidence showing that certain purchasers were unaffected by the collusive price announcements. Dow had *eight years* of discovery to obtain evidence of "individualized" negotiations. And nothing stopped Dow from offering at trial evidence of customers who purportedly resisted the cartel's efforts to increase prices. Indeed, Dow presented such evidence in an effort to secure a class-wide defense verdict, *see* SA5891, 5894, but the jury simply was not persuaded. Having tried its case to the jury and lost on the merits, Dow cannot now complain that it was not given a full and fair opportunity to respond to Respondents' evidence of class-wide impact.

B. Dow is also wrong to suggest (at 16) that the *Urethanes* plaintiffs' expert impermissibly used a "formulaic extrapolation" that "buried individual injury and damages questions that would have predominated over common questions."

Plaintiffs' expert (Dr. James McClave) analyzed all the transaction data the defendants produced in discovery—a massive data set of approximately one

million representative urethane transactions. Using a multiple regression analysis, a common statistical tool in price-fixing cases, McClave confirmed that *post-negotiation* prices vastly exceeded competitive levels. *See* 768 F.3d at 1266 n.22. Controlling for industry variables such as raw material cost, capacity, and demand, the regression showed systematic price inflation that was attributable to the cartel across all urethane product categories, defendants, geographic areas, time periods, and for large and small customers alike. SA3474, 3502-03, 3520-23. The models showed that more than 98% of modeled customers were injured and paid overcharges at some point in the class period. AA2441, 2445.

To quantify class-wide damages, McClave used the multiple regression results and applied those estimated overcharges to each class member's purchase data. For approximately one million transactions—50% of the purchase volume—McClave estimated the overcharge directly through multiple regression analysis. For the remaining transactions for which data were incomplete or unavailable, McClave extrapolated damages based on the results of his multiple regression analysis.

Dow's argument that McClave's "aggregate damages calculations"—"well established in federal court and implied by the very existence of the class action mechanism itself"—"violated Rule 23 or [its] due process rights ... fails in the starting gate." *In re Pharm. Indus. Average Wholesale Price Litig.*, 582 F.3d 156, 197-98 (1st Cir. 2009). Indeed, *Dow's own expert* did not dispute that extrapolation may be used in precisely such scenarios where "there's not enough

data points to do an analysis" for certain individual plaintiffs' damages. SA5552-54.

To the extent Dow is concerned about "the merits" of McClave's conclusions and analysis, those concerns "should normally be left to the jury." *Manpower, Inc. v. Ins. Co. of Penn.*, 732 F.3d 796, 808 (7th Cir. 2013). The jury's class-wide determination of damages based on the evidence offered at trial is a paradigmatic factual finding entitled to exceptional deference on appeal. *See, e.g., Cooper Indus. v. Leatherman Tool Grp.*, 532 U.S. 424, 432 (2001) ("A jury's assessment of the extent of a plaintiff's injury is essentially a factual determination[.]").

III. The Court's Resolution Of The Instant Case Should Not Affect The Use Of Class Actions Or Well-Established Statistical Tools In Price-Fixing Cases.

In addition to rearguing the facts of its own pending certiorari petition, Dow attempts to lump its petition together with this case, asserting (at 1) that the issues presented here "overlap" with those in the *Urethanes* case. But both the law and the facts of the *Urethanes* case are far afield from the issues in this case, and the outcome of *Urethanes* should not be dictated by the Court's resolution of the unique issues presented in *Tyson*.

First, the antitrust price-fixing claims in *Urethanes* are very different from the FLSA wage-and-hour claims at issue here. This Court has described horizontal price fixing as "the supreme evil of antitrust." *Trinko*, 540 U.S. at 408. And, even more to the point, this Court has recognized that antitrust cases are uniquely well-suited to class-wide resolution

under Rule 23, noting that "[p]redominance is a test readily met in certain cases alleging violations of the antitrust laws." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997). Any holding regarding class certification in the distinct context of FLSA wage-and-hour claims should not cast doubt on the well-established use of Rule 23 by those injured by unlawful price-fixing cartels.

Second, the record evidence in the *Urethanes* case is very different from the types of evidence that Petitioner challenges here. Petitioner takes issue with a "time study" by an industrial engineer that measured the average length of time that certain tasks took for workers in a pork-processing plant. That is far afield from the expert evidence in the *Urethanes* case, which involved a multiple regression analysis of more than one million actual urethanes transactions that controlled for numerous other variables. The regression confirmed beyond doubt that Dow's price-fixing resulted in systematic price inflation that was attributable to the cartel. Both plaintiffs and defendants in antitrust cases routinely use multiple regression analysis to prove price impact and damages (or lack thereof). *See, e.g.*, Rubinfeld, *Reference Guide on Multiple Regression* 348 n.90, in Federal Judicial Center, Reference Manual on Scientific Evidence (3d ed. 2012) (discussing use of multiple regression in price-fixing cases). Whatever this Court decides about whether the *Tyson* plaintiffs' time-study evidence is sufficient to establish class-wide damages should have absolutely no effect on the well-established use of multiple regression analysis in antitrust cases.

Third, many of the issues that Dow raises in its certiorari petition (and *amicus* brief) were waived below and would thus provide no basis for vacating the jury verdict regardless of how the Court decides this case. For example, Dow filed its motion to decertify the *Urethanes* class literally on the eve of trial, and the District Court held that this was an independently sufficient basis to deny the motion. *See Urethane*, 2013 WL 2097346, at *1. As to damages, Dow did not so much as mention "extrapolation" as an issue in any of its pre-trial *Daubert* filings. Dow also declined the District Court's invitation to move to bifurcate the damages portion of the trial, instead requesting "a single finding on class-wide damages." *Urethane*, 768 F.3d at 1259 n.11. Dow's subsequent regret in the face of an adverse class-wide verdict may be understandable, but Dow is not entitled to a mulligan to remedy its own tactical decisions and deliberate waiver of the opportunity to address damages on an individualized basis.

CONCLUSION

The *Urethanes* case involved a textbook use of Rule 23 to provide a remedy for companies that were injured by horizontal price fixing, "the supreme evil of antitrust." *Trinko*, 540 U.S. at 408. The legal and factual issues raised in the *Urethanes* case are entirely distinct from those implicated by the instant case. This Court should reject Dow's attempt to tie itself to an inapposite wage-and-hour case in order to absolve itself of liability for its years of illegal price fixing.

Respectfully submitted,

DONALD L. PERELMAN
ROBERTA D. LIEBENBERG
GERARD A. DEVER
MATTHEW DUNCAN
PAUL COSTA
FINE, KAPLAN AND BLACK, RPC
One South Broad Street
23rd Floor
Philadelphia, PA 19107

PAUL D. CLEMENT
Counsel of Record
JEFFREY M. HARRIS
BANCROFT PLLC
500 New Jersey Ave., NW
Seventh Floor
Washington, DC 20001
(202) 234-0090
pclement@bancroftpllc.com

RICHARD A. KOFFMAN
KIT A. PIERSON
CHRISTOPHER J. CORMIER
SHARON K. ROBERTSON
LAURA M. ALEXANDER
COHEN MILSTEIN SELLERS & TOLL, PLLC
1100 New York Ave. NW
Suite 500, West Tower
Washington, DC 20005

JOSEPH GOLDBERG
FREEDMAN BOYD HOLLANDER GOLDBERG URIAS & WARD, P.A.
20 First Plaza
Suite 700
Albuquerque, NM 87102

ROBERT W. COYKENDALL
ROGER N. WALTER
MORRIS, LAING, EVANS, BROCK & KENNEDY, CHARTERED
300 North Mead
Suite 200
Wichita, KS 67202

Counsel for Amici Curiae

September 29, 2015